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No. 238

In the Supreme Court of the United States

OCTOBER TERM, 1960

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 29–40) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1960. (Pet. 41.) The petition for a writ of certiorari was filed on July 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the time prescribed by Rule 37(a)(2) of the Federal Rules of Criminal Procedure for noting appeals in a criminal case can be extended by the filing of an untimely motion in arrest of judgment.

STATUTE AND RULES INVOLVED

28 U.S.C. 2255 provides in part:

> SEC. 2255 [as amended by Sec. 114, Act of May 24, 1949, c. 139, 63 Stat. 89]. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE
>
> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *

Federal Rules of Criminal Procedure:

* * * * *

> Rule 34
>
> ARREST OF JUDGMENT
>
> The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.
>
> * * * * *

Rule 36

CLERICAL MISTAKES

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Rule 37

TAKING APPEAL; AND PETITION FOR WRIT OF CERTIORARI

(a) Taking Appeal to a Court of Appeals.

* * * * *

(2) *Time for Taking Appeal.*—An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

* * * * *

Rule 45

TIME

* * * * *

(b) *Enlargement.*—When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

* * * * *

STATEMENT

Petitioners (together with two others not involved in this proceeding) were indicted for wilfully attempting to evade and defeat corporate income taxes over a four-year period and with conspiring to com-

mit those substantive offenses. (R. 11–23.)[1] Petitioners entered *nolo contendere* pleas on March 17 and 20, 1959. The court accepted the pleas and ordered a pre-sentence investigation. (R. 442–483.) In the meantime, the two remaining co-defendants were tried; one was acquitted and the jury could not agree as to the other. (Pet. 30.) On June 19, 1959, the court heard petitioners' pleas in mitigation (R. 488–551) and imposed the following sentences: upon petitioner Blocker, concurrent three-year prison terms; upon petitioners Frazier and Lott, concurrent two-year prison terms; and upon all petitioners, fines totaling $20,000 each (R. 551–553). Formal written judgments were filed on June 22, 1959. (R. 553–559.) Motions in arrest of judgment were filed on June 23, 1959, and were denied on July 13, 1959. (R. 559–

[1] The first four counts of the indictment reflected the following allegations with respect to the tax liability of Farnsworth and Chambers Company, Inc.:

NET INCOME

Year	Reported	Corrected	Additional
1951	$399,135.98	$763,599.62	$364,463.64
1952	410,937.87	495,528.77	84,590.90
1953	179,628.93	362,929.90	183,300.97
1954	282,441.03	406,898.80	124,457.77
Total	1,272,143.81	2,028,957.09	756,813.28

TAX LIABILITY

Year	Reported	Corrected	Additional
1951	$194,482.68	$482,278.98	$287,796.30
1952	207,135.40	251,122.68	43,987.28
1953	87,907.04	183,223.55	95,316.51
1954	135,797.53	200,515.57	64,718.04
Total	625,322.63	1,117,140.74	491,818.11

569.) Notices of appeal were filed by petitioner Lott on July 15, 1959, and by petitioners Blocker and Frazier on July 17, 1959. (R. 572–573, 613–615.) The Court of Appeals (one judge dissenting without opinion) dismissed the appeals as untimely. (Pet. 40.)

ARGUMENT

The Court of Appeals was plainly correct in dismissing the appeals as untimely. Petitioners filed their notices (on July 15 and 17, 1959) far beyond the 10-day period from the entry of judgments (June 22, 1959) prescribed by Rule 37(a)(2) of the Federal Rules of Criminal Procedure, *supra*, p. 3. The time for appeal was not tolled by the filing of motions in arrest of judgment, since those motions were filed (June 23, 1959) long after the 5-day period following "determination of guilt" (the date of the entry of the *nolo contendere* pleas, March 17 and 20, 1959) prescribed by Rule 34 of the Federal Rules of Criminal Procedure, *supra*, p. 2.[2] As this Court only

[2] Contrary to petitioners' view (Pet. 13–14), the Court of Appeals correctly held that the entry and acceptance of the pleas of *nolo contendere* constituted a "determination of guilt" within the meaning of Rule 34. The situation in the instant case is, in principle, no different from cases involving determinations of guilt based upon jury verdicts (*Drown* v. *United States*, 198 F. 2d 999, 1007 (C.A. 9th), certiorari denied, 344 U.S. 920) or acceptance of guilty pleas (*United States* v. *Bradford*, 194 F. 2d 197, 201 (C.A. 2d); *Marteney* v. *United States*, 216 F. 2d 760, 762 (C.A. 10th)). A plea of *nolo contendere* is an admission of guilt for the purpose of the case. *Hudson* v. *United States*, 272 U.S. 451, 455; *United States* v. *Norris*, 281 U.S. 619, 623; *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 294. Plainly, the 5-day period for moving in arrest of judgment under Rule 34 began running when petitioners' pleas were entered and accepted by the trial court.

recently stated in *United States* v. *Robinson*, 361 U.S. 220, 228, 229, "the taking of an appeal within the prescribed time is mandatory and jurisdictional," and the history of the Federal Rules of Criminal Procedure "seems almost conclusively to show a deliberate intention to eliminate any power of the courts to extend the time for the taking of an appeal."[3] See also Rule 45(b), Federal Rules of Criminal Procedure, *supra*, p. 4.

It is true that the Tenth Circuit's decisions in *Lujan* v. *United States*, 204 F. 2d 171, and *Smith* v. *United States*, 273 F. 2d 462, certiorari denied, June 27, 1960,[4] cannot be reconciled with the decision below or with the decisions of the other courts of appeals. See *O'Neal* v. *United States*, 264 F. 2d 809 (C.A. 5th); *United States* v. *Bertone*, 249 F. 2d 156 (C.A. 3d); *Drown* v. *United States*, 198 F. 2d 999 (C.A. 9th), certiorari denied, 344 U.S. 920; *Marion* v. *United States*, 171 F. 2d 185 (C.A. 9th), certiorari denied, 337 U.S. 944; *Pugh* v. *United States*, 197 F. 2d 509 (C.A. 9th); *Godwin* v. *United States*, 185 F. 2d 411 (C.A. 8th). However, in light of the analysis of the Rules which was made in this Court's subse-

[3] Petitioners' alternative suggestion (Pet. 10, fn. 3) that the untimely motions in arrest be regarded as timely motions under 28 U.S.C. 2255, *supra*, p. 2, to vacate the sentences is without merit. The Section 2255 remedy is available only to a prisoner in custody under sentence of a court. *Heflin* v. *United States*, 358 U.S. 415, 418. Petitioners are at liberty on bail. (Pet. 39.)

[4] In *Smith*, the Tenth Circuit held that the appeal was timely but found against the defendant on the merits. In opposing certiorari, the Government pointed out that the timeliness of the appeal was doubtful.

quent *Robinson* decision, *Lujan* and *Smith* cannot be deemed to have continuing vitality and probably will be overruled by the Tenth Circuit if the issue should again arise.

The narrow issue in *Robinson* was whether the Federal Rules forbade extension of the time for noting appeal in a case where the District Court had found "excusable neglect." In dealing with that question, however, this Court considered the various ramifications which would be attendant upon a holding that the ten-day rule admits of exceptions other than those specified in the Rules. Thus, the Court adverted to the situation which would be created if untimely motions for new trial or untimely motions in arrest of judgment should be permitted to extend the time for appealing. The opinion states (361 U.S. at 225):

> If, as the Court of Appeals has held, the delayed filing of a notice of appeal—found to have resulted from "excusable neglect"—is sufficient to confer jurisdiction of the appeal, it would consistently follow that a District Court may, upon a like finding, permit delayed filing of a motion for new trial under Rule 33, of a motion in arrest of judgment under Rule 34, and the reduction of sentence under Rule 35, at any time—months or even years—after expiration of the periods specifically prescribed in those Rules.

The Court rejected these various possibilities. It observed pointedly (p. 226) that the "precise times" established for the filing of motions for new trial and motions in arrest of judgment limit the power of

the courts to grant such relief. In the light of this discussion, there would seem to be no question that this Court views the filing of an untimely motion in arrest of judgment as wholly ineffective for the purpose of enlarging the time to appeal from a criminal conviction. Since it appears that the Tenth Circuit's view has been rejected in a recent and exhaustive opinion of this Court, we believe that the conflict upon which taxpayer relies has been, for all practical purposes, resolved.[5]

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[5] Since the Court of Appeals dismissed the appeals on jurisdictional grounds without reaching the merits, we shall not deal at any length with the merits, but shall merely state briefly our reasons for believing that they are insubstantial:

(a) The indictment—a plain, concise and definite statement of facts constituting the offenses charged—sufficiently informed petitioners of the nature of the substantive and conspiracy charges. Thus, among other things, the first four counts (R. 11-23) alleged that petitioners were officers of the corporation involved, set forth the substantial amounts of unreported income and taxes evaded, *supra*, p. 5, and the means of evasion (the falsifying and altering of books and records, the concealing of assets and income and the filing of false and fraudulent corporate tax returns). In the fifth count petitioners were charged with conspiring to commit the substantive offenses by means of the same acts of falsification, alteration and concealment.

(b) Petitioners' further claim that they were convicted on the evidence adduced at the trial of their co-defendants (Pet. 15–16) is without factual basis. The judgments clearly recite that each petitioner was adjudged convicted "upon his plea of *nolo contendere*." (R. 553–559.) The references to the trial of petitioners' co-defendants—not only by the trial court but also by petitioners themselves (R. 525, 541)—were made solely to aid in determining the degree of culpability of each of the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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petitioners, all of whom had filed pleas in mitigation before imposition of sentence (R. 487–553).

(c) Petitioners were not, as they assert (Pet. 16–17), convicted on misdemeanor charges. The judgments (R. 553–559; Pet. 43–48) set forth the specific felony statutes and the counts of the felony indictment of which the petitioners were adjudged convicted. The inaccurate descriptions of the charges in the judgments constituted, at the most, mere clerical errors correctible at any time by the trial court. Rule 36, Federal Rules of Criminal Procedure; *Hill* v. *Wampler*, 298 U.S. 460, 464; *Tseung Chu* v. *Cornell*, 247 F. 2d 929, 932 (C.A. 9th).

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